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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DAVID O'SHELL, Defendant and Appellant.	D052192 (Super. Ct. No. MH100473)
In re DAVID O'SHELL on Habeas Corpus.	D052648 (San Diego County Super. Ct. No. MH100473)

APPEAL from an order of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Judgment is affirmed. Petition is denied.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III through V.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

David O'Shell appeals an order involuntarily committing him for an indeterminate term to the custody of the State Department of Mental Health (DMH) after a jury found him to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (SVPA or Act). (Welf. & Inst. Code, § 6600 et seq.)[1]

O'Shell argues that the order must be reversed because: (i) the trial court erred in precluding him from testifying to the jury that he faced a life sentence under California's Three Strikes law if he reoffended; (ii) the SVPA violates the state and federal constitutional guarantees of due process because, after an initial commitment, the Act places the burden on the committed person, rather than the state, to demonstrate that he or she no longer requires confinement; (iii) the SVPA violates the state and federal constitutional right to equal protection because it treats SVP's differently from other civilly committed persons without adequate justification; and (iv) his commitment is illegal because it was initiated by a process that relied on an improper "underground regulation." As discussed below, we conclude that O'Shell's contentions are without merit and affirm the judgment.

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1 All statutory references are to the Welfare and Institutions Code unless otherwise specified.

FACTS

In 1982, at the age of 19, O'Shell met a 16-year-old boy at a party and drove him to an isolated area. O'Shell threatened the boy with a knife, forced him to orally copulate him and then sodomized him. O'Shell robbed the boy as well. O'Shell was apprehended and pleaded guilty to forcible oral copulation; he was sentenced to 11 years in prison. In 1990, 15 months after his release from prison, O'Shell began a relationship with a woman who had a 13-year-old son. For approximately four years after entering the relationship, O'Shell molested the son from one to two times a week; the molestation included oral copulation, masturbation and sodomy. In the course of this conduct, O'Shell threatened the victim's life and told him that if he did not comply, O'Shell would begin molesting the victim's brother. O'Shell was eventually caught and pleaded guilty to committing a lewd act upon a child; he was sentenced to 21 years in prison.[2]

Two psychologists, Jeremy Coles and Thomas MacSpeiden, examined O'Shell for purposes of the SVP trial. After their examinations, Drs. Coles and MacSpeiden diagnosed O'Shell with a mental disorder, "paraphilia not otherwise specified" (paraphilia

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[2] Based on the above-described offenses, the parties stipulated that O'Shell "has been previously convicted of committing sexually violent offenses against one or more victims pursuant to Welfare and Institutions Code section 6600 et seq." The complaint and guilty plea forms for each case were admitted into evidence and O'Shell acknowledged the offenses in his own testimony to the jury. From the testimony, it appears that O'Shell served six years of his 11-year sentence, and 11 years of his 21-year sentence.

NOS).[3] Dr. Coles testified that the disorder was characterized by "'recurrent, intense sexually arousing fantasies, sexual urges or behaviors generally involving [1.] non-human objects, [2.] the suffering or humiliation of oneself or one's partner, or [3.] children or other nonconsenting persons that occur over a period of at least 6 months.'" Both doctors opined that as a result of this mental condition, O'Shell was likely, upon release from custody, to reoffend in a sexually predatory manner.

Two psychologists, Robert Halon and Christopher Heard, examined O'Shell for the defense[4] and determined that he did not suffer from a mental disorder. Drs. Halon and Heard testified that O'Shell was instead, like many criminals, simply prone to antisocial behavior. The doctors also criticized Drs. Coles's and MacSpeiden's reliance on paraphilia NOS, arguing that it was an incomplete diagnosis that simply deduced the existence of a nonspecific mental disorder from O'Shell's prior crimes.[5] O'Shell testified

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3 Dr. MacSpeiden also diagnosed O'Shell with antisocial personality disorder, and opined that the two disorders constituted "a crippling combination."

4 While an SVP proceeding is civil in nature (see *People v. Allen* (2008) 44 Cal.4th 843, 860 (*Allen*)), we follow the common practice of characterizing the parties to the action as the "prosecution" and "defense." (See, e.g., *id.* at p. 866; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1192 (*Hurtado*) ["Although the SVPA is a civil proceeding, its procedures have many of the trappings of a criminal proceeding"].)

5 Paraphilia NOS is a common diagnosis in SVP proceedings. (See *People v. Felix* (2008) 169 Cal.App.4th 607, 616.) It has also been the subject of controversy. (*Id.* at pp. 614-618.) O'Shell does not raise any challenge to the order based on the paraphilia NOS diagnosis. (See *People v. Williams* (2003) 31 Cal.4th 757, 778 [rejecting challenge to SVP commitment, in part, because "[b]oth expert witnesses testified that defendant suffers from paraphilia, a serious, incurable mental disorder, which is characterized by the obsessive, repetitive, and driven nature of his criminal sexual violence"]; cf. *Kansas v. Crane* (2002) 534 U.S. 407, 413 [recognizing that the federal Constitution allows "the

that he had changed in prison and would attempt to minimize the possibility of reoffending by avoiding contact with potential victims.

DISCUSSION

We discuss O'Shell's various appellate challenges below after providing a general overview of the SVPA.

I.

Overview of the SVPA

The SVPA provides for the involuntary civil commitment of certain criminal offenders following the completion of their prison terms. To be eligible for commitment under the Act, an offender must be classified as an SVP, which is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) "'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (*Id.*, subd. (c).)

SVPA proceedings are initiated by the Secretary of the Department of Corrections and Rehabilitation (the Secretary). When the Secretary determines that an inmate appears to meet the SVP criteria, the inmate is referred to the DMH for assessment.

States . . . considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment"].)

(§ 6601, subd. (b).) The DMH "shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health." (*Id*., subd. (c).) The protocol must involve an evaluation by two doctors "to determine whether the person is a sexually violent predator." (*Id.*, subds. (a)-(d).)

If both doctors concur that "the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody," the DMH must request the filing of a commitment petition in the superior court in the county where the offender was convicted of the crime for which he or she is currently imprisoned. (§ 6601, subds. (d), (i).)

Once the petition is filed, the superior court holds a hearing to determine whether there is "probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602, subd. (a).) If no probable cause is found, the petition is dismissed. However, if the court finds probable cause within the meaning of this section, the court orders a trial to determine whether the person is an SVP. (*Ibid.*) The precise issue at trial is "whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections or other secure facility." (§§ 6602, subd. (a), 6600, subd. (a)(1).) The statute also includes an "implied requirement" that the forecasted sexual violence be *predatory*, i.e., that it be "'directed "toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or

promoted for the primary purpose of victimization."'" (*Hurtado*, *supra*, 28 Cal.4th at pp. 1186, 1182; § 6600, subd. (e).)

The alleged SVP is entitled "to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports." (§ 6603, subd. (a).) The jury's verdict must be unanimous. (*Id*., subd. (f).)

At the conclusion of the trial, the trier of fact "shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." (§ 6604.) "If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health." (*Ibid*.; see generally *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922 (*Ghilotti*).)

A person found to be an SVP is entitled to an annual review to determine whether he or she "currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community." (§ 6605, subd. (a).) The SVP may also retain, or request court appointment of, a qualified expert to examine him or her. (*Ibid.*) If the DMH determines

that the committed person is no longer an SVP or, alternatively, can safely be released to a less restrictive treatment setting, it shall file a petition with the superior court to that effect. (*Id*., subd. (b).) A probable cause hearing and subsequent trial follow at which the state must prove "beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged." (*Id*., subd. (d).) If the fact finder determines that the state has not met its burden, the committed person must be released. (*Id*., subd. (e).)[6]

The statute also provides for the SVP to petition for release without the concurrence of the Director of Mental Health. (§ 6608.) For these purposes, the SVP is entitled to the assistance of counsel and may file a petition with the superior court after one year of the initial commitment and at yearly intervals thereafter. (*Id*., subds. (a), (c), (h).) Unless the court deems the petition to be frivolous, or substantially identical to a previously denied petition (see *id*., subd. (a)), a trial is held with the court acting as finder of fact. (*Id*., subd. (d).) At the trial, the committed person must demonstrate that he or she is no longer an SVP by a preponderance of the evidence. (*Id*., subd. (i).) If the trial court rules in favor of the committed person, "the court shall order the committed person

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6 A parallel provision permits the DMH to seek judicial review through habeas corpus proceedings of a commitment if it determines that the committed person is no longer an SVP. If in such proceedings, "the superior court determines that the person is no longer a sexually violent predator, he or she shall be unconditionally released and unconditionally discharged." (§ 6605, subd. (f); see generally *Allen*, *supra*, 44 Cal.4th at p. 873.)

placed with an appropriate forensic conditional release program operated by the state for one year." (*Id*., subd. (d).) At the end of the year, the court holds a hearing to determine whether the (former) SVP should be unconditionally released. (*Ibid*.)[7]

II.

O'Shell's Testimony That He Faced a Life Sentence If He Reoffended Was Relevant but Its Exclusion Was Harmless

O'Shell contends that the trial court erred by excluding his testimony that he already had two strikes under the Three Strikes law and would not risk the automatic life sentence that would follow from a third strike. We address this contention after setting forth the pertinent procedural history.

A. *Procedural History*

Prior to trial, the prosecution moved to preclude any mention that O'Shell was a two-strike offender who would face a life sentence if convicted of a third felony. The defense opposed the motion, arguing that the potential consequences of reoffending, and O'Shell's knowledge of those consequences, were relevant to a determination of his likelihood of reoffending.

The trial court granted the prosecution's motion, stating that the evidence "goes to part of the punishment aspect" and "is not particularly relevant." The prosecutor then sought to "clarify" the court's ruling. The prosecutor noted that her "motion was not only

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7 Section 7250 also states that "[a]ny person who has been committed is entitled to a writ of habeas corpus. . ." and subsequent judicial review of his or her confinement.

that it was not relevant . . . but also that it would be prejudicial under Evidence Code [section] 352." The trial court stated, "So noted."

At trial, the prosecution called O'Shell as a witness. (See *Allen*, *supra*, 44 Cal.4th at p. 860 ["the Fifth Amendment's guarantee against compulsory self-incrimination does not apply in proceedings under the SVPA"].) The prosecutor asked O'Shell about the parole supervision he would receive upon release. The prosecutor pointed out that O'Shell had committed one of his prior offenses while on parole, and that parole supervision and the threat of revocation, "didn't stop you" from committing a second offense. The prosecution then attempted to elicit that O'Shell violated his probation as a juvenile offender, but O'Shell stated he did not recall any such violations. Finally, the prosecution elicited that an 11-year prison sentence "didn't deter [O'Shell] from molesting" the second victim. The prosecutor asked, "If you're [found] not to be an SVP and you're placed on parole, the fact that you could be violated, that won't affect you either, will it, sir?" O'Shell explained that he had changed while in prison.

In response to this line of questioning, defense counsel asked O'Shell about the consequences of a violation of his release conditions. O'Shell stated, "It's a violation. I can go back to prison." O'Shell added, "If a violation constitutes a felony, then I go to prison for a very long time." The prosecutor objected, and the trial court sustained the objection and instructed the jury to disregard O'Shell's answer.[8]

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[8] The issue arose again in the testimony of one of the prosecution's experts who opined that placing O'Shell in the community would be "a disservice to Mr. O'Shell" because "if he gets another conviction, he would go away for a long, long time." The

B. *The Excluded Evidence Was Relevant*

O'Shell contends that the trial court erred in excluding as irrelevant his proposed testimony (and striking his testimony) that he was particularly motivated to seek treatment and avoid reoffending because he faced a life term if he reoffended under the Three Strikes law. We agree.

Unless otherwise provided by statute, "all relevant evidence is admissible." (Evid. Code, § 351.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . , having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "[T]he trial court 'has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence.'" (*People v. Weaver* (2001) 26 Cal.4th 876, 933; Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) The SVPA itself contains a provision that emphasizes that "[n]othing in this section shall prevent the defense from presenting otherwise relevant and admissible evidence." (§ 6603, subd. (d).)

Relevance is a two-part inquiry. First, the fact sought to be proven must be "of consequence to the determination of the action." (Evid. Code, § 210.) Second, the proffered evidence must have some "tendency in reason" to prove that fact. (*Ibid.*) Here both parts of the inquiry were satisfied.

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prosecutor then stated, "We can't talk about that part," and the judge instructed the jury to disregard the answer.

The fact sought to be proven was that O'Shell was not likely to reoffend. This is a central issue in an SVP trial. As our Supreme Court has emphasized, an SVP finding "requires both a qualifying mental disorder *and* a 'likel[ihood]' of reoffense, and the one does not predetermine the other." (*Ghilotti, supra,* 27 Cal.4th at p. 921, fn. 12.) Consistent with this case law, the jury was instructed that to find O'Shell was an SVP it had to determine that: (i) he had a diagnosed mental disorder; (ii) as a result of that disorder he was "likely" to engage in sexually violent predatory criminal behavior; and (iii) that it was "necessary to keep him in custody in a secure facility to ensure the health and safety of others." (See CALCRIM No. 3454.)[9] The instruction states that a person was "likely to engage in sexually violent predatory criminal behavior if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community." (See CALCRIM No. 3454; *Ghilotti*, *supra*, 27 Cal.4th at p. 916.)

Thus, a jury in an SVP trial can properly conclude that an inmate has a mental disorder, but is not an SVP because he or she would be able to resist the urge to reoffend. (*Ghilotti, supra,* 27 Cal.4th at pp. 920-921 ["The requisite likelihood of reoffense is thus a separate determination which does not inevitably flow from one's history of violent sex offenses and a predisposing mental disorder"]; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 254 (*Cooley*) ["We made clear in *Ghilotti* that the determination of

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9 The jury also had to find that O'Shell had committed a qualifying offense. (See CALCRIM No. 3454.) That element was undisputed. (See fn. 2, *ante*.)

likelihood of future dangerousness was an element that must be proved in addition to the existence of mental disorder in order to commit an individual as an SVP"]; cf. *Kansas v. Crane*, *supra*, 534 U.S. at p. 412 ["most severely ill people — even those commonly termed 'psychopaths' — retain some ability to control their behavior"].) Consequently, whether O'Shell was likely to reoffend was a fact of consequence to the determination of the action.

It is also clear that the proffered evidence met the second aspect of the relevance inquiry — it had some tendency in reason to disprove the likelihood of reoffense. As our Supreme Court has explained, "[m]any factors . . . may influence the disordered offender's *motivation*, ability, means, and opportunity to function lawfully without supervision or restraint despite [a mental] impairment." (*Ghilotti, supra,* 27 Cal.4th at p. 921, fn. 12, italics added.) One such factor is the offender's "expressed intent, if any, to seek out and submit to any necessary treatment" and "*any other indicia bearing on the credibility and sincerity of such an expression of intent*." (*Id*. at p. 929, italics added; see also *People v. Roberge* (2003) 29 Cal.4th 979, 987 [clarifying that the definition of "the phrase 'likely [to] engage in sexually violent behavior' in section 6600, subdivision (a), should be given the same meaning as the phrase 'likely to engage in acts of sexual violence without appropriate treatment and custody' in section 6601, subdivision (d), the provision at issue in *Ghilotti*"].)

In the instant case, the severe penalties that would be imposed under the Three Strikes law if O'Shell were to reoffend, and his fear of those penalties, had a tendency in reason to increase O'Shell's "motivation . . . to function lawfully without supervision or

restraint despite the [mental] impairment." (*Ghilotti, supra,* 27 Cal.4th at p. 921, fn. 12.) In addition, O'Shell claimed that he was willing to attend outpatient treatment for his disorder. His awareness of the severe penal consequence of reoffense bore on "the credibility and sincerity" of his expressed intent not to reoffend and to seek treatment to avoid doing so. (*Id.* at p. 929; Evid. Code, § 210 [emphasizing that relevant evidence includes evidence that is relevant to the credibility of a witness]; cf. Evid. Code, § 780 ["Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing"].)

In sum, O'Shell's testimony as to the consequences of reoffense under the Three Strikes law was not properly excluded as irrelevant. The jury would, of course, be free to disregard the testimony (once admitted) as self-serving and entitled to little weight. Nevertheless, the excluded testimony was not irrelevant and the trial court did not have the discretion to exclude it on that basis.

C. *The Trial Court's Ruling Cannot Be Affirmed Under Evidence Code Section 352*

Rather than contend that the trial court's ruling was correct on relevance grounds,[10] the Attorney General argues that the trial court "would not have abused its discretion by excluding the evidence under Evidence Code section 352" had it so ruled. The Attorney General contends that as we are required to affirm a correct ruling on any

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10 The Attorney General does not make any explicit argument that the evidence was irrelevant, contending only that it did not constitute "evidence of significant probative value" and "the probative value, if any," of the evidence "was not significant."

ground, we should affirm the trial court's relevance ruling on the ground that the evidence would have been properly excluded under Evidence Code section 352.

We disagree with the Attorney General's contention for two reasons. First, a ruling under Evidence Code section 352 is expressly committed to the *trial court's* discretion by statute. Evidence Code section 352 states that the trial court

> "*in its discretion* may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ibid*., italics added.)

There is no provision in this statute or in the case law for an appellate court to conduct the requisite Evidence Code section 352 balancing in the first instance, which is what the Attorney General would have us do here.

The analysis might be different if the Attorney General were able to show that the evidence would have been excluded *as a matter of law* under Evidence Code section 352, but no such showing has been made.

While we agree (as we explain in part II.D, *post*) that the probative value of the excluded testimony was not particularly compelling, we nevertheless do not see a "substantial danger of undue prejudice," jury confusion or consumption of time inherent in O'Shell's testimony that he was particularly motivated not to reoffend by his fear of a third strike. (Evid. Code, § 352.) The testimony was brief and straightforward and spoke directly to a central issue in an SVP case — the likelihood of reoffending. Further, the evidence regarding the potential deterrent effect of likely criminal sanctions responded to a line of inquiry pursued *by the prosecutor* on direct examination. Thus, the proper

treatment of the excluded evidence under Evidence Code section 352 was, at most, a question upon which reasonable judges could disagree and cannot be resolved as a matter of law on appeal.

Second, for evidence to be properly excluded under Evidence Code section 352, "the record must 'affirmatively show that the trial court weighed prejudice against probative value.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1237.) This requirement provides "the appellate courts with the record necessary for meaningful review" and "ensure[s] that the ruling" is "'the product of a mature and careful reflection on the part of the judge.'" (*People v. Green* (1980) 27 Cal.3d 1, 25.) Here, there is no such affirmative showing. In fact, the record reflects that despite the prosecutor's request, the trial court declined to engage in Evidence Code section 352 balancing.

D. *The Error Was Harmless*

Although we conclude that the trial court erred in excluding O'Shell's testimony as irrelevant, we also believe reversal is not warranted because there has been an insufficient showing of prejudice.

An appellate court may not order a new trial on the ground of the erroneous exclusion of evidence unless the record shows that, absent the error, there is a reasonable probability that the outcome would have been different. (See Cal. Const., art. VI, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"]; Evid. Code, § 354 ["A verdict or

finding shall not be set aside . . . by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error . . . is of the opinion that the error . . . complained of resulted in a miscarriage of justice"].)[11]

In the instant case, evidence concerning O'Shell's enhanced motivation to avoid a felony conviction, while relevant, was tangential to the primary disputed issue at trial. The focus of the defense case was not that O'Shell was unlikely to reoffend. Rather, the defense tried to show that even if O'Shell were likely to reoffend, it would not be because of any mental disorder. This contention, if accepted by the jury, constituted a complete defense because "[a] sex offender who *lacks a qualifying mental disorder* cannot be committed *no matter how high his or her risk of reoffense*." (*Ghilotti, supra,* 27 Cal.4th at p. 921.)

Defense counsel framed the case around the mental illness question, contending in closing argument that "[t]he issue is whether [O'Shell] has a current diagnosable mental disorder." As noted above, the prosecution's experts diagnosed O'Shell with paraphilia NOS. The defense experts disputed the diagnosis and contended that paraphilia NOS was not a distinct mental disorder, but merely an empty diagnosis that reasoned backward

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11 O'Shell recognizes the *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) "reasonable probability" standard as the appropriate standard of review. (See *People v. Buffington* (2007) 152 Cal.App.4th 446, 456 (*Buffington*) [analyzing trial court's evidentiary error in SVP proceeding under *Watson* standard of review]; *People v. Alcala* (1992) 4 Cal.4th 742, 791 [evidentiary rulings reviewed for prejudice under *Watson* reasonable probability standard]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 [evidentiary error under state evidence rules is properly evaluated under "standard of review . . . announced in [*Watson*], and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension"].)

from O'Shell's prior criminal acts. The jury, by its verdict, credited the prosecution's experts on this key disputed question.

On the separate question of the likelihood of reoffending, there was little serious dispute. Even Dr. Halon, a defense expert, testified that "any prudent person would have to consider [O'Shell] to represent a danger of reoffending." O'Shell's own testimony and statements to the evaluating psychologists were also damning on this point. O'Shell explained that his sex crimes fulfilled a need and that he had been "addicted to the behavior" in the four years he was molesting his second victim. Further, O'Shell's prior offenses themselves painted a graphic picture of an uncontrolled predator who ceased offending solely upon incarceration.

When the prosecutor asked O'Shell "What are you going to do to avoid victimizing another person?" O'Shell responded, "That's a very good question. . . . I can't specifically say." O'Shell then asserted that he would try to "avoid certain situations," adding, somewhat unrealistically, that if he encountered children, he "would run away as fast as I could."

In addition, O'Shell's testimony, even if buttressed by his fear of a potential Three Strikes sentence, remained subject to obvious impeachment on the grounds that: (i) he had a strong interest in the outcome of the proceedings; and (ii) he had not previously been deterred by the prospect of significant criminal penalties. Even Dr. Halon, who testified on O'Shell's behalf, stated he did not credit O'Shell's claim that he had changed in prison, stating that O'Shell had no genuine remorse and was a "master manipulator."

(Cf. *Allen, supra,* 44 Cal.4th at p. 873 [concluding that error in precluding entirety of defendant's testimony in SVP proceeding was harmless].)

In sum, the evidence was overwhelming and largely uncontested that O'Shell posed a "*substantial*[,] *serious, and well-founded risk*" of reoffending upon release. (*Ghilotti, supra,* 27 Cal.4th at p. 916.) Consequently, the fact that the trial court erroneously excluded a portion of his testimony relevant only to this point was harmless. As the case was litigated primarily on the question of whether O'Shell had a qualifying mental disorder, it is not reasonably probable that had the court allowed O'Shell's testimony regarding his fear of the Three Strikes law, the jury would have reached a different verdict.

III.

The SVPA Does Not Violate Due Process

O'Shell contends that the SVPA, as amended in November 2006,[12] violates due process because, under the amended law, the state must prove an SVP's mental illness and future dangerousness only upon initial commitment. Subsequently, "a person, once

12 "The SVPA was amended in various respects by Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law (hereinafter, Proposition 83), which was approved by the voters at the General Election in November 2006. Among the changes made by this enactment was an amendment to section 6604 providing a commitment for an indeterminate term rather than for two years." (*Allen, supra,* 44 Cal.4th at p. 849, fn. 4.)

committed, can be held for the rest of his life without any requirement that the State prove that he remains mentally ill or dangerous."[13]

O'Shell recognizes that two panels of this court, as well as all of the other courts of appeal that have been presented with the question, have concluded that the SVPA comports with the dictates of due process. He argues that those cases, which are currently pending review in the Supreme Court and thus noncitable, "were wrongly decided."

We begin our analysis with the basic principle that "all legislation" is "presumed to be constitutional." (*People v. Jackson* (1980) 28 Cal.3d 264, 317; *In re Anderson* (1968) 69 Cal.2d 613, 628 ["There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional"].) In light of this principle, O'Shell must carry the burden of establishing that the SVPA violates due process to prevail on his contention. He fails to do so.

While "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection" (*Addington v. Texas* (1979) 441 U.S. 418,

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13 While O'Shell contends that the SVPA violates the due process clauses of both the California and federal Constitutions, he does not make any argument that separate analysis is warranted under state and federal law. In this circumstance, our Supreme Court has stated that we should look to the United States Supreme Court case law as "persuasive for purposes of the state Constitution." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1152, fn. 19 (*Hubbart*).) The same applies to his argument under the equal protection clauses of the California and federal Constitutions, which we discuss in part IV, *post*. (*Ibid*.)

425 (*Addington*)), the federal Supreme Court has repeatedly upheld commitment statutes analogous to the SVPA against constitutional challenge. (See *Kansas v. Hendricks* (1997) 521 U.S. 346, 357 (*Hendricks*) ["We have consistently upheld . . . involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards"].) In *Hubbart, supra,* 19 Cal.4th 1138, the California Supreme Court similarly upheld the then-existing SVPA against a challenge that it violated due process, emphasizing that the Act did not differ in any significant respect from commitment proceedings upheld by the federal Supreme Court. (*Hubbart*, at pp. 1152-1168.) Although the challenges at issue in *Hubbart* are distinct from those involved here, and the Act has been amended since *Hubbart* has been decided, the language in *Hubbart* generally supports a conclusion that the present SVPA is constitutional. Our Supreme Court stated in *Hubbart*:

> "The SVPA is narrowly focused on a select group of violent criminal offenders who commit particular forms of predatory sex acts against both adults and children, and who are incarcerated at the time commitment proceedings begin. Commitment as an SVP cannot occur unless it is proven, beyond a reasonable doubt, that the person currently suffers from a clinically diagnosed mental disorder, is dangerous and likely to continue committing such crimes if released into the community, and has been found to have sexually victimized at least two people in prior criminal proceedings. The problem targeted by the Act is acute, and the state interests — protection of the public and mental health treatment — are compelling." (*Hubbart*, *supra*, 19 Cal.4th at p. 1153, fn. 20.)

O'Shell highlights an aspect of the SVPA that has changed since *Hubbart*, which he contends renders the present SVPA unconstitutional — the requirement that, absent action by the DMH, a person committed as an SVP who seeks relief from commitment must establish by a preponderance of the evidence that he or she is no longer an SVP.

O'Shell cites no case that has found this requirement, or an analogous one, to be unconstitutional.[14] Instead, O'Shell argues that such a conclusion follows from the federal Supreme Court's analysis in other cases.

Specifically, O'Shell relies on four cases decided by the United States Supreme Court since 1979. The cases are not controlling, however, as each involved involuntary commitment statutes of different jurisdictions, and three of the four cases actually reject constitutional challenges analogous to those at issue here.

In the earliest case, *Addington*, *supra*, 441 U.S. 418, the Supreme Court held that the federal Constitution did not require Texas to meet a higher standard than "'clear and convincing'" evidence to "commit an individual involuntarily for an indefinite period to a state mental hospital." (*Id.* at pp. 433, 419-420.) The court expressly held that a finding "beyond a reasonable doubt" (the burden that California would later elect to impose under the SVPA for an initial commitment) was not mandated by the federal Constitution. (*Id.* at p. 431.)

In *Jones v. United States* (1983) 463 U.S. 354 (*Jones*), the Supreme Court held that the federal Constitution did not preclude the District of Columbia from indefinitely confining a defendant who, after being charged with misdemeanor petit larceny, was

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14 In *Hubbart*, our Supreme Court noted that under the then-existing SVPA, "the maximum length of each commitment term is relatively brief — two years," after which the state was required to prove the SVP's continued need for involuntary commitment beyond a reasonable doubt. (*Hubbart, supra,* 19 Cal.4th at pp. 1166-1167.) The court did not suggest, however, that the constitutionality of the Act hinged on this factor. (*Ibid.*)

found not guilty by reason of insanity. (*Id.* at pp. 359-360, 369.) The court held that the District was not required to conduct a separate civil commitment proceeding in such circumstances because (i) "[i]t comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment"; and (ii) the government has a "strong interest in avoiding the need to conduct a *de novo* commitment hearing following every insanity acquittal — a hearing at which a jury trial may be demanded . . . and at which the Government bears the burden of proof by clear and convincing evidence." (*Id.* at p. 366, citation omitted.)

In *Hendricks*, *supra*, 521 U.S. 346, the Supreme Court held that Kansas's SVPA did not violate the federal Constitution. (*Id.* at p. 371.) In reaching this conclusion, the court explained that "[w]e have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" (*Id.* at p. 358.) The holdings of these three cases, *Hendricks*, *Jones* and *Addington*, thus, support rather than call into question the constitutionality of the SVPA.

Only one of the four cases O'Shell relies on invalidated an involuntary commitment proceeding, *Foucha v. Louisiana* (1992) 504 U.S. 71. In *Foucha*, Louisiana involuntarily committed a criminal defendant who had been found not guilty by reason of insanity on charges of burglary and illegal discharge of a firearm. (*Id.* at pp. 73-74.) Four years later, doctors at the state commitment facility recommended that the defendant be discharged because he no longer suffered from a mental illness. (*Id.* at pp. 74-75.)

After conceding that the defendant did not suffer from a mental illness, Louisiana continued to detain him on the ground that he had failed to carry the burden of establishing that he was no longer dangerous. (*Id.* at p. 75.) The federal Supreme Court held that the state's action violated due process. The court emphasized, in line with the precedent described above, that the state may confine a person "if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous,'" but in light of Louisiana's concession that the defendant was not mentally ill, Louisiana "has not carried that burden." (*Id*. at p. 80.) In the instant case, of course, O'Shell was found to be both mentally ill and dangerous. Thus, *Foucha* is easily distinguished.

We recognize that the Supreme Court's consistent approval of civil commitment statutes has included an assumption of periodic review and procedures for release of individuals who no longer meet the commitment criteria. (*Jones*, *supra*, 463 U.S. at p. 368 ["because it is impossible to predict how long it will take for any given individual to recover — or indeed whether he ever will recover — Congress has chosen, as it has with respect to civil commitment, to leave the length of commitment indeterminate, subject to periodic review of the patient's suitability for release"]; *Addington*, *supra*, 441 U.S. at pp. 428-429 ["even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected"]; *Hendricks*, *supra*, 521 U.S. at pp. 368-369 [recognizing that Kansas statute "permitted immediate release upon a showing that the

individual is no longer dangerous or mentally impaired"].) Such review, however, is provided under the SVPA.

Indeed, O'Shell's contention is not that the SVPA contains *no* procedures for review, but rather that the annual review procedures are inadequate because they are not substantively identical to those required for an initial commitment. We can find no support for such a requirement anywhere in the Supreme Court case law discussed above or in California law. In fact, all the authority is to the contrary. (See, e.g., *Addington*, *supra*, 441 U.S. at p. 420 [upholding involuntary commitment for "an indefinite period" based on an initial finding of mental illness and future dangerousness by clear and convincing evidence]; *Hendricks*, *supra*, 521 U.S. at p. 353 [upholding Kansas's SVPA that required commitment "'until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large'"].)

In sum, the cases relied on by O'Shell rebut rather than support his contention that the SVPA violates due process. The case law establishes, as a general matter, the constitutionality of "civil commitment statutes [that] couple[] proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" (*Hendricks*, *supra*, 521 U.S. at p. 358.) The SVPA meets this general requirement and we are satisfied, despite O'Shell's contentions to the contrary, that the Act otherwise comports with the requirements of due process.[15]

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15 O'Shell also contends that the statute is unconstitutional because if, without the concurrence of the Director, he is deemed to no longer be an SVP, "he does not get *unconditionally* released until he spends a full year in an out-patient program." (Italics

IV.

The SVPA Does Not Violate Equal Protection

O'Shell also contends that the SVPA violates his constitutional rights to equal protection under the law. Specifically, he argues that while all persons committed under California's various civil commitment statutes are similarly situated, only the SVPA (as amended in 2006) "no longer provides for periodic re-confinement with the right to a jury trial at each period of review." O'Shell again acknowledges that the other courts that have evaluated this challenge, including two panels of this court, have deemed it to be without merit. (Again, those decisions are being reviewed by our Supreme Court and are thus noncitable.)

"'"The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."'" (*Cooley, supra,* 29 Cal.4th at p. 253.) "'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.'" (*Ibid.*) "This initial inquiry is not whether persons are similarly

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added.) As the record does not reflect any imminent application of this provision to O'Shell, and also does not reflect the outpatient restrictions O'Shell would face if released under the challenged provision, we do not deem this contention ripe for review. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170 ["The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions"]; see also § 7250 [providing habeas corpus review for persons involuntarily committed].)

situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Ibid.*)

If this initial hurdle is not cleared, the equal protection challenge fails. "'[N]either the Fourteenth Amendment of the Constitution of the United States nor the California Constitution [citations] precludes classification by the Legislature or requires uniform operation of the law with respect to persons who are different.'" (*People v. Guzman* (2005) 35 Cal.4th 577, 591.)

Applying the above legal standards, we conclude that O'Shell's equal protection claim fails because SVP's are not similarly situated to persons committed under other civil commitment statutes.

While the other civil commitment statutes O'Shell cites deal with a much broader class of mentally ill persons, the SVPA "narrowly targets 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.'" (*Cooley*, *supra*, 29 Cal.4th at p. 253.) SVP's engender a different set of risks to the community than persons who are involuntarily committed under the Lanterman-Petris-Short Act (which includes persons who have not committed any crime, Welf. & Inst. Code, § 5300.5, subd. (b)), persons found not guilty by reason of insanity (Pen. Code, § 1026), mentally disordered individuals (Pen. Code, § 2960 et seq.) and mentally disabled juvenile offenders (Welf. & Inst. Code, § 1800 et seq.). Each of these other potential commitment classifications may include persons who pose a relatively minimal danger to the community or who have mental illnesses that are of short duration, easily treatable and not likely to reoccur.

These characteristics simply do not apply to SVP's. As the findings and declarations for Proposition 83 note: "'"Sex offenders have very high recidivism rates. According to a 1998 report by the United States Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend, and they prey on the most innocent members of our society. More than two-thirds of the victims of rape and sexual assault are under the age of 18. Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon."'" (Historical and Statutory Notes, 47A West's Ann. Pen. Code (2008 supp.) foll. § 209, p. 462; see Voter Information Guide, Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 172.)

Additionally, an SVPA commitment requires a finding that the individual is not simply a danger to himself or others, but that he is "likely to commit sexually violent *predatory* behavior upon release." (*Hurtado*, *supra*, 28 Cal.4th at p. 1182.) "Because predatory offenders could strike at any time and victimize anyone, they pose a much greater threat to the public at large. In contrast, a defendant likely to commit crimes only against family members or close acquaintances is less likely to reoffend because potential victims will be aware of the defendant's status as a sex offender. The public at large, however, is inevitably more defenseless against acts committed by strangers." (*Id.* at pp. 1187-1188.)

The treatment and prognosis for SVP's also differs from the other civil commitment classifications noted by O'Shell. As a general matter, SVP's suffer from mental disorders that generally require long-term treatment and have only a limited likelihood of cure. The findings and declarations for Proposition 83, which amended the

SVPA, specifically recognize that "'"sex offenders are the least likely to be cured."'" (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 83, p. 127.) The Florida Supreme Court has observed that "the 'treatment needs of this population are very long term' and necessitate very different treatment modalities from those appropriate for persons committed under" other commitment schemes. (*Westerheide v. State* (Fla. 2002) 831 So.2d 93, 112.)

Further, even if we agreed that O'Shell was similarly situated to persons committed under other civil commitment statutes, that does not mean the SVPA would be unconstitutional. Even if persons are similarly situated, the Legislature may still draw distinctions among civilly committed persons if those distinctions are "necessary to further a compelling state interest." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1156.) For the same reasons we have just discussed in drawing distinctions between SVP's and other civilly committed persons — increased danger to society, low probability of cure, and increased likelihood of recidivism — the challenged aspect of the SVPA (a requirement that, after an initial confinement, the offender rather than the state establish that a person is no longer an SVP) survives equal protection challenge.

As the Wisconsin Supreme Court observed in rejecting an equal protection challenge similar to the one O'Shell presents here: "The legislature has determined that, as a class, persons predisposed to sexual violence are more likely to pose a higher level of danger to the community than do other classes of mentally ill or mentally disabled persons. This heightened level of dangerousness and the unique treatment needs of sexually violent persons justify distinct legislative approaches to further the compelling

governmental purpose of protection of the public." (*State v. Post* (Wis. 1995) 541 N.W.2d 115, 130.)

V.

The DMH's Reliance on Underground Regulations Does Not Warrant Reversal

O'Shell next contends that because his commitment proceedings were initiated through a process tainted by regulations that were not promulgated properly under California's Administrative Procedures Act (APA), he was "illegally committed" and must be released. O'Shell adds that due to the use of underground regulations, "every single current sexually violent predator commitment is illegal" and must be invalidated. At least with respect to the instant case, we disagree.

As we discussed in summarizing the SVPA in part I, *ante*, prior to the filing of a commitment petition, the DMH must evaluate a potential SVP "in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator." (§ 6601, subd. (c).) The assessment consists of an evaluation "by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of Mental Health." (*Id.*, subd. (d).) "If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of Mental Health shall forward a request for a petition for commitment." (*Ibid.*)

O'Shell asserts that to establish the statutorily required "standardized assessment protocol" (§ 6601, subd. (c)), the DMH published a handbook for its SVP evaluators.

According to O'Shell, the "Office of Administrative Law has determined that this handbook contained numerous illegal, underground regulations."

O'Shell contends that in light of the DMH's reliance on improper underground regulations to satisfy the statutory requirements for the filing of his petition, his commitment is void and he must be released. This same claim has been rejected by our colleagues in the First and Second Districts. (See *People v. Medina* (2009) 171 Cal.App.4th 805 (*Medina*); *People v. Castillo* (2009) 170 Cal.App.4th 1156 (*Castillo*). We find the reasoning of those cases persuasive and reject the challenge as well.[16]

Even if we were to assume for purposes of this appeal, that O'Shell has correctly identified a procedural flaw in the pretrial proceedings, this by no means requires automatic reversal of his commitment.[17] Rather, we would examine the effect of the procedural error to determine the appropriate remedy.

O'Shell contends that automatic reversal is required because the reliance on underground regulations deprived the trial court of fundamental jurisdiction over the

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16 The Attorney General contends that O'Shell forfeited the contention by failing to raise it in the trial court. O'Shell responds that any objection would have been futile and that if an objection was required, his counsel was ineffective for failing to make it. As we resolve the challenge on the merits, we need not determine whether the objection was forfeited.

17 The Attorney General does not dispute O'Shell's contentions as to the ruling of the Office of Administrative Law (OAL) and, while explicitly declining to concede the point, does not provide any argument that the conclusion of the OAL is incorrect. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 428 [recognizing that "[t]he OAL's determination in this regard is entitled to due deference"].) Given our ultimate disposition of this contention, we need not determine whether the DMH, in fact, relied on improper underground regulations in processing O'Shell's commitment petition.

matter. O'Shell fails to cite any authority for this proposition and we conclude it is incorrect.

As we have stated, prior to the filing of an SVPA petition, the DMH must evaluate a potential SVP "in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator." (§ 6601, subd. (c).) The DMH did exactly that in the instant case. The fact that the "standardized assessment protocol" was adopted in violation of the APA, if established, requires redress under the APA, but does not demonstrate that O'Shell's petition was filed in violation *of the SVPA*, much less that the violation deprived the court of fundamental jurisdiction over the proceedings. (*Castillo*, *supra*, 170 Cal.App.4th at p. 1178 [rejecting contention that use of underground regulations rendered "commitment proceedings void *ab initio* and therefore subject to per se reversal"]; cf. *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653 [distinguishing between "void" orders which are those entered by a court that lacks "'jurisdiction in its most fundamental or strict sense'" and acts despite "'an entire absence of power to hear or determine the case'" or "'an absence of authority over the subject matter or the parties'" (*id*. at p. 660), and "voidable" orders, on the other hand, where "'the court has jurisdiction over the subject matter and the parties in the fundamental sense,'" but cannot act "'except in a particular manner'" or "'without the occurrence of certain procedural prerequisites'" (*id*. at p. 661)].) Despite the alleged absence of "'certain procedural prerequisites,'" the trial court had fundamental jurisdiction over the case and thus automatic reversal is not warranted. (*Ibid*.)

In determining the appropriate remedy for the DMH's reliance on underground regulations in an SVPA proceeding, other courts have drawn an analogy to a pleading defect in criminal proceedings and held that reversal is warranted, as in criminal cases, only upon a showing of prejudice. (See *Medina, supra,* 171 Cal.App.4th 805; *People v. Butler* (1998) 68 Cal.App.4th 421, 435 (*Butler*).) This requirement is drawn from *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519 (*Pompa-Ortiz*), which held that

> "irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects." (*Pompa-Ortiz, supra*, 27 Cal.3d at p. 529; *People v. Hayes* (2006) 137 Cal.App.4th 34, 51 ["*Pompa-Ortiz* applies to SVP proceedings"].)

This examination of the prejudice of any procedural error is also supported by the California Constitution, which commands that:

> "No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see also *Pompa-Ortiz, supra*, 27 Cal.3d at p. 522 [referencing art. VI, § 13 at outset of its analysis].)

Applying this analysis to the procedural defect alleged in the instant case, we can find no prejudicial error. As the error is one of state law only, we apply the test of *Watson, supra*, 46 Cal.2d 818: state law error warrants reversal only if it is reasonably

probable that the error altered the outcome of the proceedings below. (*Medina*, *supra*, 171 Cal.App.4th 805.)

While initial evaluations conducted under a standard protocol were a procedural prerequisite to O'Shell's commitment trial, they were not the subject of that trial. "[O]nce the petition is filed a new round of proceedings is triggered." (*People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130.) "After the petition is filed, rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior." (*Ibid.*) As the People were able to make such a showing here, we fail to see how the alleged flaw in the underlying pretrial evaluation *procedures* supports a conclusion that O'Shell "was deprived of a fair trial or otherwise suffered prejudice" warranting reversal. (*Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.)

O'Shell's only argument that the procedural defect he identifies here altered the outcome of his trial (and thus could warrant reversal on appeal, *Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529) is his speculation that "a fair and objective regulation adoption process" might "[p]ossibly" incorporate some of the criticisms of the prosecution's experts that the defense experts made at trial, causing the prosecution's experts to alter their opinions. We do not believe this type of conjecture is sufficient to demonstrate prejudice from the underground regulations. (*Medina*, *supra*, 171 Cal.App.4th 805 [rejecting similar contention]; *Butler*, *supra*, 68 Cal.App.4th at p. 435 [insufficient showing of prejudice from trial court's failure to provide proper probable cause hearing in SVP proceeding].) Nothing in the record suggests that the prosecution experts' opinions were influenced by

the DMH handbook. Consequently, there is no reason to assume, as O'Shell does, that a change in the protocol would alter the experts' conclusions.

In sum, because the alleged flaw in the evaluation procedure did not deprive the trial court of fundamental jurisdiction over the SVP proceeding, O'Shell must show prejudice. As he has failed to do so, we reject the contention that the DMH's purported reliance on underground regulations requires reversal of O'Shell's commitment.[18]

DISPOSITION

Judgment is affirmed. Petition is denied.

CERTIFIED FOR PARTIAL PUBLICATION

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

MCDONALD, J.

18 O'Shell has also filed a pro se petition for habeas corpus while his appeal was pending. In that petition, O'Shell argues that the state SVP evaluators' use of "actuarial instruments (Static-99, RRASOR, MN-SOST-R, etc.) in lieu of standard psychological tests (MMPIS, MCMI, Abel Screening, etc.) to determine or predict future recidivisms and dangerousness" violates the due process and equal protection clauses. O'Shell fails to show that this objection was raised in the trial court and therefore it is forfeited for purposes of appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 434-438.) In addition, O'Shell's arguments in support of the petition show that the contention goes to the weight of the expert opinion evidence presented at his trial (a question for the jury), and not the constitutionality of his commitment proceedings. Consequently, we deny the habeas corpus petition.